IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.3408 OF 2006
IN
SUMMARY SUIT NO.1387 OF 2003

Vasant Zaveribhai Sanghvi ...Plaintiff

Versus

M/s.Perfect Traders & Ors. ...Defendants

Shri Pratap B. Kapadia for the Plaintiffs.

Shri Shah i/by N.S.Fadia for the Defendant No.3.

CORAM : ABHAY S.OKA, J.
DATED : AUGUST 06, 2007.

P.C.:

1. I have heard submissions of the learned counsel appearing for the third Defendant in support of this Notice of Motion. I have also heard the learned counsel for the Plaintiff.

2. By order dated 25th July, 2005 the summary suit filed by the Plaintiff was decreed in terms of minutes of decree on admission. This Notice of Motion has been taken out by the third Defendant for setting aside the order dated 25th July, 2005 passed in the suit and consequentially for restoration of the suit.

3. The learned counsel for the third Defendant submitted that this Court has purported to pass a decree

on the basis of minutes of decree on admission which is not signed by the third Defendant. The submission of the learned counsel is that in view of section 19 of the Indian Partnership Act, 1932, the second Defendant though a partner of the first Defendant-Firm had no implied authority to sign the compromise on behalf of the third Defendant. He submitted that the consent, if any, is vitiated by section 23 of the Indian Contract Act, 1872.

4. He pointed out the averments made in paragraph No.6 of the affidavit in support in which it is stated that relying on the assurance of the second Defendant the third Defendant alongwith second Defendant appointed a common advocate Mr.Pande and the third Defendant signed vakalatnama of the said Advocate. It is stated that the third Defendant had never given any authority to the second Defendant to sign any paper or proceeding or to enter into any consent terms. It is stated that the Plaintiff is the brother-in-law of the second Defendant and the second Defendant in connivance with the Plaintiff has signed the consent terms/minutes. He submitted that from the plain reading of the document annexed as annexure ‘A’ to the plaint it is obvious that the second Defendant and the Plaintiff have colluded and now they are trying to extract the decretal amount from

the third Defendant. The Notice of Motion is strongly objected to by the learned counsel appearing for the Plaintiff.

5. I have considered the submissions. It will be necessary to refer to relevant part of the averments made in paragraph No.6 of the affidavit in support of Notice of Motion. It is an admitted position that the third Defendant was served with the writ of summons and he had notice of the fact that the Plaintiff had filed the suit against him, his brother and the partnership firm for recovery of sum of Rs.8 lakhs with interest on the sum of Rs.7 lakhs. In the said paragraph No.6, the third Defendant has stated thus:

> "5. I say and submit that after few months I once again enquired from my brother as to whether he has repaid the said loan to the Plaintiff or not to which he informed me not to worry about as he will repay the same within a short time.
>
> 6. Once again I enquired from my brother about the Suit as to why the Plaintiff has filed suit when he was to settle the matter with the Plaintiff. At that time my brother informed me

that he was not in a position to pay the aforesaid amount and therefore the Plaintiff filed the above suit and that I need not worry about the same as he will settle the matter with the Plaintiff as the Plaintiff is his brother in law. He also informed me that he will represent me in the Court and I need not remain present in the court as and when the matter is coming up in the court. Relying on his assurance, we appointed common Advocate Mr.Pandey and I signed the Vakalatnama. I say that thereafter I have never visited the Office of the said Advocate. I say and submit that I have not given any authority to my brother to sign any paper or proceedings or to enter into any Consent Terms on my behalf without my knowledge. I say that on or about 25th July, 2005 my brother in connivance with the Plaintiff being his brother in law have signed the Consent Terms. Hereto annexed and marked as EX "A" is the copy of the Order dated 25th July, 2005".

6. The perusal of the record shows that vakalatnama of Advocate Mr.Pande is not filed. The record shows that on 15th July, 2005 Shri Ajay K. Rao, Advocate filed vakalatnama singed by all the three Defendants.

Perusal of the said vakalatnama shows that the second Defendant has signed for himself and as a partner of the first Defendant and the third Defendant has also signed the vakalatnama. In the affidavit in support, the third Defendant has not even referred to this vakalatnama. The third Defendant has not denied that Shri Ajay K.Rao filed vakalatnama for all the three Defendants. Though the said vakalatnama is on record, the third Defendant has not disputed his signature on the said vakalatnama. It is also pertinent to note that the third Defendant has not stated the date and/or other particulars on which he alongwith the second Defendant allegedly appointed Mr Pande as their Advocate. The surname of the said Advocate has been mentioned but office address of the said Advocate is not mentioned. Moreover, the vakalatnama of the said Advocate is not on record and as stated earlier, vakalatnama of Shri Ajay K.Rao is on record.

7. The order dated 25th July, 2005 passed in the suit discloses that Shri Ajay K. Rao represented all the three Defendants. This Court has recorded that the Plaintiff and the second Defendant were present and the Plaintiff and Defendants had filed minutes of decree on admission. A statement has been recorded in the order that terms recorded therein were acceptable to both the

Plaintiffs and Defendants. Thus, on 25th July, 2005 the third Defendant was represented by Shri Rao, Advocate. In the affidavit in support the third Defendant has not at all disputed the authority of Shri Ajay K. Rao to represent him. Infact in the affidavit in support the fact that the third Defendant signed vakalatnama in favour of Shri Ajay Rao, Advocate has been suppressed. It is thus obvious that the minutes of decree on admission have been duly signed by Shri Ajay Rao who was representing the third Defendant and as stated earlier, the third Defendant has not disputed the authority of Shri Ajay Rao.

8. In view of aforesaid factual aspects, the case of the third Defendant that the second and third Defendants had infact appointed Mr Pande as their Advocate cannot be accepted. In view of the fact that minutes of decree on admission have been signed by an Advocate representing the third Defendant whose authority to appear is not disputed by the third Defendant, it is not necessary to go into submissions made by the learned counsel appearing for the third Defendant as regards collusion and connivance of the Plaintiffs and the second Defendant.

9. There is no merit in the Notice of Motion and

the same is accordingly dismissed.

10. No orders as to costs.

11. Certified copy is expedited.

JUDGE